Supreme Court, U.S.
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No. 85-147

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

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Southwest Chemical Services, Inc.

*Petitioner,*

v.

The Superior Court of Maricopa County and the Hon. Howard V. Peterson, a judge thereof; Arizona Public Service Company; Mid-Mountain Contractors, Inc.; and Susan J. Smith,

*Respondents.*

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## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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## I. THE ARIZONA SUPREME COURT'S ORDER IS A "FINAL JUDGMENT."

Despite abundant precedent to the contrary (See Petition at 1-2 and n. 3), Respondents contend that the order below is not a reviewable final judgment.

Respondents' position rests on three arguments. First, they observe that Arizona's "special action" or extraordinary writ relief is discretionary. (Brief in Opposition at 4-5). Yet this Court, per Chief Justice Marshall, long ago recognized the reviewability of a state court's denial of extraordinary writ relief. *Weston v. City Counsel of Charleston*, 2 Pet. 449 (1829). Although *Weston* is cited in the Petition (at p. 2), Respondents ignore it. Respondents also cite no authority that the discretionary nature of the state court's decision makes its judgment somehow non-final.

Second, respondents argue that the order below was not final because it was not accompanied by an opinion. (Brief in Opposition at 5). That is Respondents' sole distinction of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). *World-Wide* was procedurally identical to this case: this Court assumed jurisdiction over the Oklahoma Supreme Court's denial of extraordinary writ relief after the trial court denied a motion to dismiss for lack of jurisdiction.

The absence of an opinion on the merits does not render an otherwise final judgment into a non-final one. This Court has already decided this point. In *Michigan Cent. R. Co. v. Mix*, 278 U.S. 492 (1929), the Missouri Supreme Court denied an extraordinary writ application without opinion. Justice Brandeis wrote for the Court that the denial of the application "is final within the meaning" of the predecessor statute to 28 U.S.C. § 1257. This holding is the only sensible one: this Court's review of an otherwise final judgment cannot be frustrated by a state court's refusal or failure to put its *ratio decidendi* into words. Nor does 28 U.S.C. § 1257 so limit this Court's power.

Respondents' third argument is that because a later appeal is possible, the present judgment is not final. This Court's

opinion in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), leaves no room for such an argument. *Cox* summarized the many cases in which this Court has held that the judgment was final even though further proceedings would occur in the state court. Moreover, the possibility of appeal existed in such cases as *World-Wide* and *Shaffer v. Heitner*, 433 U.S. 186 (1977); this Court nevertheless reviewed the judgments because they were final ones.

Judgments in such cases are final because immediate review is the only practical means of deciding the federal question involved. Prompt review prevents future litigation that is wholly wasted if the federal issue has been wrongly decided. *Mercantile Nat. Bank v. Langdeau*, 371 U.S. 555, 558 (1963); *Cox*, 420 U.S. at 482-83. That is an important factor in this massive and extremely costly case. If on the other hand this case proceeds and Petitioner prevails on the merits, Petitioner will not appeal and the federal issue will be mooted. Its constitutional rights will never be vindicated and the important questions of law will not be presented to this Court. *See Cox*, 420 U.S. at 482-83.

Moreover, the judgment below is a final decision in another sense. If decided favorably to Petitioner, the federal issue is dispositive. If Petitioner is correct, the case against it must be dismissed. That state law issues may remain for decision (if the federal question was correctly decided) should not obscure the controlling final nature of the judgment on the federal question.

## II. RESPONDENTS' ARGUMENTS ON THE MERITS IGNORE THE REASONS FOR THIS COURT TO ACCEPT THE PETITION TO DECIDE THE MERITS.

The brief in opposition to certiorari argues the merits. It does not address the threshold question of whether this Court should decide the merits.

The powerful public policy and juridical reasons for granting the petition are undenied. Respondents do not contest that:

— The due process limits on jurisdiction over "upstream" defendants have never been explicitly defined. (Petition at 4-5, 9).

— The lower federal courts are deeply divided over those limits, and cannot even agree whether *World-Wide* has any precedential value in upstream cases. (*Id.* at 6-9).

— The problem of unlimited jurisdiction over upstream non-residents will only worsen, since the States tend to expand their own jurisdiction. (*Id.* at 9).

— Upstream businesses play a crucial role in the nation's commerce in manufactured goods, and their need for certainty to transact business strongly supports review. (*Id.* at 5).

— A conflict exists in the lower courts as to which party bears the burden of proving jurisdictional facts. (*Id.* at 11-12).

— The burden of proof issue is important because it is a threshold question presented by every motion to dismiss for lack of jurisdiction. (*Id.* at 12).

The reasons for granting review are thus essentially unchallenged. Respondents instead attempt to argue the merits, with two exceptions. The first exception is that Respondents say that burden of proof is not really an issue. They agree that they bore the burden of proof, deny having rested upon the allegations of their complaint, and argue that they sus-

tained their burden of proving jurisdiction with many exhibits. (Brief in Opposition at 12-13). [1]

Actually, in the *Smith* case, none of the Respondents offered more than two shipping documents, neither of which showed any activity by Petitioner in Arizona. Instead, APS and Smith expressly relied on their bare allegations and disclaimed any burden of proving these allegations as facts:

> It is these allegations in the Complaint which form the basis for the allegation ... that Southwest was doing business in the State of Arizona and/or has caused an event to occur in the State out of which this claim arises. *This is the basis for the Court's jurisdiction over Southwest.* ... In reviewing a Motion to Dismiss for Lack of Jurisdiction Over the Person, *this Court must accept as true all material facts as alleged* by the non-moving party. ... In this case, *the Court must consider*

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[1] Most of the exhibits upon which Respondents rely show no facts regarding jurisdiction. For example, Respondents say that "Southwest Chemical participated in the manufacture of the ... resin ..." (Brief in Opposition at 13). It is undisputed that the entire resin manufacturing process occurred in Texas, not Arizona.

Other facts recited by Respondents relate to the forum state of Arizona but have nothing to do with Petitioner. For example, the resin was shipped to Arizona from Petitioner's Texas plant. However, all shipments were by Sinclair's arrangements with a common carrier or by the Arizona customer, which came to Texas to pick up the product. Not a single document or deposition reveals that Petitioner had any involvement in shipping, selling or marketing Sinclair's resin product.

Other facts are distorted. For example, although Petitioner chose the compounding process (Brief in Opposition at 2), no evidence shows that there was any defect in the resin, much less one related to the compounding process. APS recently admitted to the trial court that after years of extensive discovery and exhaustive laboratory tests of the pipe, APS has uncovered no evidence whatever of any improper work by Petitioner. Moreover, while Respondents tell this Court that one compounding process results in "better dispersion" (*id.*), they neglect to inform the Court that all the evidence shows that both processes provided entirely adequate dispersion. Again, this evidence has nothing to do with jurisdiction, since all of the petitioner's compounding work was done in Texas.

> *as true those allegations* contained in [plaintiff's] ... Complaint.

(APS's Response to Motion to Dismiss at 4-5, adopted by reference in Smith's Response at 3; emphasis added).

Respondents' second argument against issuing the writ of certiorari is that *Burger King Corp. v. Rudzewicz*, _____ U.S. _____, 105 S. Ct. 2174 (1985) contains the definitive statement on the burden of proof which Petitioner seeks. (Brief in Opposition at 14). Although Respondents quote *Burger King*, they do not quote a definitive statement on the issue. Nor does Petitioner find such a statement in that opinion. Nor did that case squarely present the issue. The need persists for a straightforward statement that the party asserting the Court's jurisdiction bears the burden of proof by prima facie evidence when challenged by a motion to dismiss, and by a preponderance of evidence at a trial or preliminary hearing.

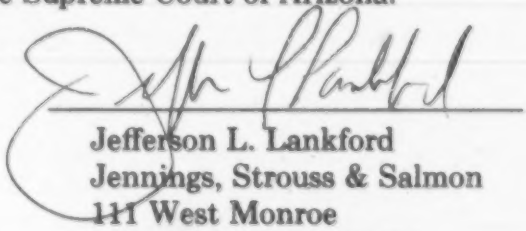
The remainder of Respondents' arguments concern the merits and are thus premature. In their zeal to convince the Court that the decision below was correct, however, the Respondents have inadvertently supported the Petition: their arguments on the merits reveal the need for a decision by this Court on the merits.

For example, Respondents argue that Petitioner's ability to foresee interstate distribution of the resin, or its knowledge of interstate shipments by the primary manufacturer, subjects Petitioner to Arizona jurisdiction. (Brief in Opposition at 7). Many courts accept this position. (Petition at 8-9). Other courts, citing *World-Wide* and other decisions of this Court, require purposeful activity by the defendant in contact with the forum rather than mere passive awareness. (*Id.* at 7-8). Respondents' argument merely illuminates the dispute; it does not conclusively resolve it.

Other arguments obscure the issues instead of illuminate them. Respondents strongly urge that Petitioner is a component manufacturer rather than a provider of services.

(Brief in Opposition at 6). The distinction matters little: service companies, component manufacturers and suppliers of raw materials are all "upstream" in the flow of commerce. (Petition at 5). All are much more remote from the plaintiff and the forum than a primary manufacturer, distributor or retailer. (*Id.* at 5, 7). Respondents overgeneralize that such upstream defendants serve a broader market than those downstream, and actively promote their product "in as many forums as possible." (See Brief in Opposition at 10-11). For example, a component manufacturer could be a company with almost entirely intrastate business, but which is fortuitously located near a General Electric, Boeing or IBM plant. If it receives a small contract from one of these interstate economic giants, is the small company amenable to suit anywhere, without limit? The Brief in Opposition raises more questions that it resolves.

For the foregoing reasons, Petitioner Southwest Chemical Services, Inc., respectfully requests that the Court issue a Writ of Certiorari to the Supreme Court of Arizona.



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